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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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# No. 924

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WABASH VALLEY COACH CO., A CORPORATION,
*Petitioner,*

*vs.*

GERTRUDE B. SALE, AS PRESIDENT OF WABASH VALLEY COACH CO., BURWELL W. SALE, AS SECRETARY-TREASURER OF WABASH VALLEY COACH CO., GERTRUDE B. SALE AND BURWELL W. SALE AND CHARLES A. TURNER,
*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA AND BRIEF IN SUPPORT THEREOF.

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THOMAS F. O'MARA,
*Counsel for Petitioner,*
*Wabash Valley Coach Co.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1942**

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# No. 924

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WABASH VALLEY COACH CO., A CORPORATION,
*Petitioner,*

*vs.*

GERTRUDE B. SALE, AS PRESIDENT OF WABASH VALLEY COACH CO., BURWELL W. SALE, AS SECRETARY-TREASURER OF WABASH VALLEY COACH CO., GERTRUDE B. SALE AND BURWELL W. SALE AND CHARLES A. TURNER.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

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*To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Wabash Valley Coach Co., in the above entitled cause, shows:

A.

### Jurisdictional Statement.

Jurisdiction of this petition is based upon Section 237 of the Judicial Code amended Sub-section b, Section 344

(28 U. S. C. A.). The petitioner set up its constitutional right under Section 1 of the Fourteenth Amendment of the Constitution of the United States by way of a Motion to Dismiss the Appeal in the Supreme Court of Indiana.

The judgment appealed to the Supreme Court of Indiana was rendered in the Superior Court of Vigo County No. 2, for the use and benefit of the petitioner-corporation in a stockholder's suit brought by Charles A. Turner, a respondent herein. This judgment canceled as void, certain shares of the corporation's outstanding stock acquired and held by the respondent Sales, ordered the cancelled stock surrendered to the petitioner and enjoined the sale of unissued stock of the corporation for less than par. A "vacation appeal" in which notice to all parties to a judgment is required was filed by the said Sales, individually and as President and Secretary-Treasurer respectively of the corporation by an assignment of errors naming this petitioner as an appellant. The legal counsel signing and filing the assignment of errors was selected by the Sales, respondents herein, and appeared both for them and this petitioner notwithstanding the conflict of interest. No notice was given to the corporation. The Petitioner's claim of right was based on Section 1 of the Fourteenth Amendment of the Federal Constitution securing to the petitioner the right to due process and the equal protection of the laws thereunder, including in this case the right of notice of the said appeal and to be bound by counsel selected by and acting for the persons against whom the judgment was obtained. Want of due process was therein set up under the holding of *Hansberry* v. *Lee* (1940) 311 U. S. 32, 45 and *Glasser* v. *United States* (1942) 315 U. S. 60, 76. These claims were

denied by the Supreme Court of Indiana through its ruling striking out the Motion to Dismiss the appeal.

The State Supreme Court at the same time reversed the judgment of the trial court and thus annulled the order of cancellation and surrender to petitioner corporation of the shares of stock in controversy and also thereby annulled the injunctive decree against the issue of authorized stock for less than par.

The judgment of the Supreme Court of Indiana was rendered on January 14, 1943, a petition for re-hearing was seasonably filed on February 2, 1943 (R. 125) and overruled on February 8, 1943 (R. 131).

The judgment of the trial court had been rendered on January 28, 1942. A "vacation appeal" was taken by the two Sales individually and respectively as President and Secretary of the corporation petitioner, giving notice to Charles A. Turner, the plaintiff below and respondent herein but giving no notice to this petitioner, the Wabash Valley Coach Company, merely assuming to join it as an appellant in the assignment of errors which together with the transcript of the proceedings of the trial court was filed on April 22, 1942 as appears in the court's opinion. The title to this cause in the Supreme Court of Indiana as it appears in the assignment of errors was as follows: No. 27718, Wabash Valley Coach Co., Gertrude B. Sale, President, Wabash Valley Coach Co., Burwell W. Sale, Secretary-Treasurer, Wabash Valley Coach Co., Gertrude B. Sale, Burwell W. Sale, Appellants, vs. Charles A. Turner, Appellee. The briefing of the case in the Supreme Court was concluded on August 15, 1942, and the petitioner's Motion to Dismiss was filed on October 9, 1942 (R. 38).

However as appears in the petitioner's Motion to Dismiss the appellants Gertrude B. Sale and Burwell W. Sale were until the judgment of January 14, 1942 the majority stockholders of the corporation and until August 17, 1942 constituted the majority of its board of directors and also were respectively its President and Secretary. The corporation was thus in the hands of its respondent officers, adverse parties to it, until on the annual stockholders' meeting day August 17, 1942, a new board of directors was elected by the majority of the common stock thereof remaining after the cancellation of the stock by the judgment of the trial court. At that time a new board of directors was elected and new officers were selected to succeed the said Sales as President and Secretary. The new officers selected new counsel for the corporation who at the first opportunity after a reasonable time for investigation and preparation filed the said Motion to Dismiss the appeal on October 9, 1940 (R. 37) before the argument of the cause below. The petitioner contends also that by virtue of the judgment below the corporation-petitioner became vested with a property interest of which it could not be deprived under the due process clause of the Fourteenth Amendment of the Federal constitution without notice to it or though its purported void joinder as an appellant from the judgment of which it was the beneficiary, under the legal doctrine and rationale of a stockholder's derivative suit prevailing in Indiana which the Supreme Court of Indiana did not in this case profess to alter or modify.

The assignment of errors upon appeal in Indiana is in the nature of a complaint, and by the purported, though void, joinder of this petitioner-corporation as an appellant therein, it was unlawfully made to appear as taking affirmative

action to abrogate the judgment in its own favor. Naturally this question could be raised for the first time only in the Supreme Court and no action by the corporation itself to nullify the purported joinder was possible until after the regular annual stockholders' meeting held on August 17, 1942.

There was no conflict of interests between this petitioner-corporation and Charles A. Turner, the stockholder, plaintiff-appellee below, as the Supreme Court itself referred to him as having an interest "adverse to the Sales," against whom the judgment was recovered. The Supreme Court itself made no finding of facts.

The material portion of the court's opinion is set out in Appendix 1 to the petitioner's brief hereto attached, p. 59, at the close of which the judgment of the Supreme Court of Indiana appears.

The judgment and opinion of the State Supreme Court appears in *Wabash Valley Coach Co. et al.* v. *Turner* (1943) — Ind. —, 46 N. E. (2d) 212, 218 (Official report not yet published).

## I

### Summary Statement of the Matter Involved.

1. This petitioner, the Wabash Valley Coach Co., seeks by this petition for the writ of certiorari to review the judgment of the Supreme Court of Indiana, rendered in this cause on January 14, 1943, reversing a judgment of the trial court, although on the face of the assignment of errors in the Supreme Court of Indiana this petitioner is made to appear as an appellant, its joinder as appellant being challenged in the State Supreme Court under the due process and equal protection clauses of the Fourteenth Amendment.

While this petitioner was joined as a co-defendant in the trial court in the stockholder suit of Charles A. Turner, named as respondent above, the suit under the theory of a stockholder's derivative suit prevailing in Indiana, as elsewhere, was instituted by said Turner, a stockholder, for and on behalf of the corporation against Gertrude B. Sale and Burwell W. Sale, Gertrude B. Sale as President of Wabash Valley Coach Co., and Burwell W. Sale as Secretary-Treasurer of Wabash Valley Coach Co., as co-defendants with Wabash Valley Coach Co., by reason of which there was an actual conflict of interest between said corporation and its co-defendants.

2. The respondent, Charles A. Turner, on August 1, 1939 began a stockholder's suit in the Superior Court of Vigo County, No. 2, against Wabash Valley Coach Co., petitioner herein (also designated in the pleadings as Wabash Valley Coach Company), Gertrude B. Sale, as President of the Wabash Valley Coach Co., Burwell W. Sale, as Secretary-Treasurer thereof, Gertrude B. Sale and Burwell W. Sale, individually, alleging that 108.77 shares of common stock of said company had been issued without consideration as dividend stock to and acquired and were then held by Burwell W. Sale and Gertrude B. Sale, and that such issue was in violation of Sections 21 and 22 of Chapter 35, Ind. Acts 1921; under which this petitioner was organized as a corporation, and also in violation of Section 1, Chapter 206, Ind. Acts 1921; and prayed for the cancellation of this stock and for an immediate restraining order, temporary and final injunctions against the issue or sale to said Sales or any other persons of further stock for less than par (R. 2).

Answers both in denial and containing affirmative defenses were filed (R. 16).

The trial court's findings (R. 21) were: that the challenged shares had been issued without consideration, in

violation of the statutes pleaded, the certificates thereof were void and should be cancelled, and showed the respondent, Turner, owning 100 out of the total 150 outstanding shares legally issued and uncancelled. The court concluded the law was with the plaintiff, that the disputed shares should be cancelled and "the temporary injunction should be made permanent and continued in full force and effect" (R. 26). A final judgment to that effect was entered (R. 26). The text of this final judgment as well as the text of the temporary injunction and the finding preceding the same are set out in Appendix B to this Petition as the same are important for handy reference in the consideration of the State Supreme Court's opinion.

### 3. Proceedings on Appeal

(a) The appeal reached the Supreme Court of Indiana only as a "vacation appeal," and it was so characterized in the opinion of the court. (See opinion below—46 N. E. (2d) 212, 217.)

It is not disputed that no notice of appeal was given this petitioner and that applicable State Statutes and Rules of Court are mandatory in requiring notice of vacation appeals to be given to "adverse" parties. Sections 2-3206, 2-3212, 2-3213, 2-3214—B. Ind. R. S. 1933, and Rules 2-3 and 2-30, B. Ind. R. S.—1942 Supp.

It was the position of the respondents, the two Sales, that the joining of this petitioner as an appellant by the action of the same counsel although representing and selected by the two Sales, was valid and was effective in making this petitioner a party appellant, thus dispensing with the notice otherwise required.

Counsel for the petitioner disputing the above views of the respondents, the Sales, was not chosen by the respondents, the Sales, but selected by the newly elected officers

following the regular annual stockholders' meeting, next succeeding the filing of the appeal. This was the first opportunity the corporation had of obtaining counsel independent of the two Sales, and consequently the first opportunity the petitioner had to raise the validity of its joinder in the appeal as an appellant. The view presented by new counsel appearing specially for the petitioner was that the supervening force of due process and the equal protection clauses of the Fourteenth Amendment necessarily inhibited the selection by the officers of the corporation of the same counsel to represent the corporation and also themselves who were adverse in interest to it and its fiduciaries as well, and that consequently the officers selecting the dual counsel who filed the assignment of errors had no power to join the corporation as an appellant against its interest, and to their own advantage.

(b) The petitioner's special claim of constitutional right challenging the jurisdiction of the State Supreme Court to proceed was set up in its "Special Appearance and Verified Motion to Dismiss the Appeal" (R. 38).

This motion filed October 5, 1942, alleged that the respondents, Gertrude B. Sale and Burwell W. Sale were at the time of the filing of the assignment of errors in the Supreme Court of Indiana, the then directors of this petitioner and also respectively its President and Secretary, by virtue of previous majority stock control held by means of the stock cancelled by the judgment, and thus at that time sustained a fiduciary relationship to this corporation petitioner, and that they had selected the legal counsel who signed and filed the assignment of errors in the name of the respondents, the two Sales, and of this petitioner as co-appellants seeking to reverse the judgment of the trial court; and that said Sales "could not claim the benefit of any

appeal lodged therein through the ministration and services of said counsel'' (R. 64).

This motion expressly set up that to proceed with the appeal when the court had no jurisdiction of the petitioner or of the cause of action appealed, inasmuch as no notice was ever given to the petitioner of the filing of the vacation appeal, would deprive the petitioner of its property without due process of law and would deny to it the equal protection of the laws secured to it under the Fourteenth Amendment of the Constitution of the United States, and it further challenged the dual representation of the Sales, respondents herein, and of this petitioner by the same counsel selected by the Sales who were adverse in interest to it, and who, although fiduciaries of the petitioner, sought to reverse the judgment of the trial court beneficial to it and injurious to the respondents, the Sales, as depriving this petitioner of its property without due process of law and in denial of the equal protection of the laws secured to it under the Fourteenth Amendment (R. 63-65).

It claimed that this void dual representation of counsel did not constitute a voluntary appearance on the part of the corporation so as to confer jurisdiction on the Supreme Court over the appeal or over the person of the corporation, and that to recognize such appearance as binding upon the corporation would deny to it the equal protection of the laws and due process of law in violation of the Fourteenth Amendment. It further declared that the lodging of the appeal through the void dual representation challenged as aforesaid and without notice to it rendered the appeal itself void (R. 65).

It further asserted that the Supreme Court did not in the absence of this petitioner have before it the parties necessary to the complete determination of the controversy and of the question involved, namely the validity of the issue of

the stock cancelled by the judgment of the trial court, and that to proceed would deprive this petitioner of its property in violation of its constitutional claim under the Fourteenth Amendment of the Federal Constitution (R. 66).

It further asserted that a denial of recognition of the newly chosen counsel and of the newly elected officers would deprive the corporation of valuable rights and deny to it due process of law and the equal protection of the laws secured under the Fourteenth Amendment aforesaid (R. 61).

The statement of the claim of right of this petitioner secured to it under the Fourteenth Amendment of the Constitution of the United States was elaborate and explicit and quite too extensive to copy verbatim in this petition proper, but pertinent extracts from the petitioner's verified motion to dismiss the appeal, disclosing the claims of constitutional right more fully, are subjoined in Appendix C, and by reference made a part of this petition.

The Motion to Dismiss explained the delay of the Wabash Valley Coach Co. to appear by counsel representing it alone and not representing its adversaries in that the corporation had no opportunity to do so until after the statutory regular annual stockholders' meeting on August 17, 1942, when a new Board of Directors not dominated by the Sales were elected (R. 45).

This new Board of Directors chose new officers, including Charles A. Turner as President and Frank P. Walters as Secretary. The new Board consisted of the former director Burwell W. Sale, and the new members Sam Hammond and Charles A. Turner. Through their action the present counsel for the petitioner, Thomas F. O'Mara, was authorized and employed to represent this petitioner (R. 48). This counsel was unfamiliar with the litigation and required time to investigate and prepare the Motion to Dismiss, and did file the same with due diligence on October 5, 1942.

With the petition was filed this counsel's authority to appear, under the hand and seal of the petitioner corporation (R. 37).

Supporting the authority of the Board of Directors to select new counsel the Motion to Dismiss set up in detail the proceedings and a certified copy of the minutes of the stockholders' and directors' meetings of August 17, 1942, showing the same were held in conformity with the Articles of Incorporation pleaded in the Motion and also with the provisions of the By-Laws of the corporation, disclosing that a quorum was present of all stock not ordered cancelled and that the majority thereof voted for the newly elected Board of Directors, Sam Hammond, Charles A. Turner, respondent, (appellee below) and Burwell W. Sale, who was personally present at these meetings (R. 46).

The motion itself and contents were duly verified in positive terms. (R. 67), so as to be competent evidence of its contents.

It pleaded the recognition of the new Board and the newly elected President by Burwell W. Sale and a former director, Blanche Stitt, by their specific acts and acknowledgments, and the possession and operation of all of the offices and equipment and the recognition of the new officers by the public in general, by all the agents and employees of the company, and the newly elected officers were in daily, constant charge of the public utility operated by the petitioner, and asserted their *de jure* election, and that they were at least the *de facto* officers of the corporation (R. 61).

(c) An answer but not verified as required by law to constitute evidence (*Henderson* v. *Reynolds* (1907) 168 Ind. 522, 526, 530; *Marshall* v. *Matson* (1908) 171 Ind. 238; *Ledger Pub. Co.* v. *Scott* (1923) 193 Ind. 683; *Hoosier Nat'l.*

*Life Co.* v. *Gary Electric Co.* (1938) 214 Ind. 957) was filed to which a properly verified Reply was filed.

But the court below did not rest its decision upon any insufficiency or defect in the election of the new officers so far as any defect in the meetings was involved but treated the stockholders' meetings as regular and sufficient in form and other requirements, merely holding as more fully noted below that no stockholders' meetings could be legally held merely because the final injunction was interpreted to forbid all stockholders' meetings forever.

4. Analysis of the Decision of the Supreme Court of Indiana.

46 N. E. (2d) 212, Advance N. E. Report, March 3, 1943.

The Supreme Court below treated the proceedings as a "vacation appeal" and acknowledged the necessity of notice in such cases as to all interested parties who did not join. It held that the lack of notice to Wabash Valley Coach Co. was obviated in that "the corporation appealed in its own right through its attorneys of record below," adding "that was sufficient to give the court jurisdiction of the person of the corporation". The court said:

> "There is no contention that the attorneys who filed the appeal were not then authorized by the then officers of the corporation to appear for the corporation and perfect the appeal for it. The other parties appellant were not required to take any further steps to bring the corporation into court, and their appeal cannot be defeated by the effort of new and later officers of the company to revoke the action of the former officers."

The Court thus misapprehended the contention of the petitioner that the "lodging of the appeal was void." It misapprehended the fundamental constitutional contention which was not, that the new officers were revoking "the ac-

tion of the former officers," but that the action of the former officers in joining the petitioner as an appellant was itself void under due process. The very power of the officer of a corporation to use his office for his personal advantage but against the interest of the corporation was involved. In the words of Mr. Justice Douglas in *Pepper* v. *Lytton*, 308 U. S. 309, 311: "He can not use his power for his personal advantage but to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements."

The court below did not expressly decide whether the new officers of the corporation selecting counsel, who presented the motion of the petitioner to dismiss were *de jure* or *de facto* or were neither *de jure* or *de facto*. The court by an extraordinary and ill-founded holding, if the same may be called a holding, rather than an intimation, disposed of the authority of counsel presenting the petitioner's said motion and left to inference only its views upon the status of the newly elected officers. The Court on this point said:

> "* * * we notice the suggestion in the court below that there was a temporary injunction as follows:
> "It Is Therefore Ordered Adjudged and Decreed by the court that a temporary injunction be and is granted as prayed by the plaintiff in his petition, in full force and effect, and that said temporary injunction be and is granted under promise and providing that no meetings of the stockholders herein are held, all until the further order of this Court."

The ruling was ill-founded in declaring that the promise and condition upon which the temporary injunction was granted became a part of the injunctive order so as to form a part of the permanent injunction, especially when so to treat it would interdict forever all future stockholders' meetings against the statutory requirement of the very

incorporation Act of 1921, that directors be elected by the stockholders *annually*. It was only a mere *modus vivendi*.

The court below held the petitioner was only "a nominal party" without interest, yet did not profess to change the rationale of stockholder's derivative suits prevailing in Indiana and in this court. This rationale set out in Pomeroy Equity Jurisprudence Section 1095, Vol. 4, page 276 (Last Ed.) is expressly approved in *Tevis* v. *Hammersmith* (1903) 31 Ind. App. 281, 283, 284 and also in *Carter* v. *Ford Plate Glass Co.* (1881), 85 Ind. 180, expressly following *Davenport* v. *Dows* (1873), 18 Wall. 626, 627, declaring the corporation is the real "beneficiary" of the judgment obtained.

Although the court did not in its decision once refer to the constitutional claims of right of this petitioner, it necessarily denied them by its ruling. The questions which the Supreme Court below decided were necessarily intermingled and interwoven with the assertion and determination of the Federal questions involved. These holdings were ill-founded, untenable and mere pretexts to evade a decision of the constitutional question in terms and did not constitute adequate non-Federal grounds upon which to base its decision; and consequently all these questions are properly Federal questions and for the independent and exclusive determination of the Supreme Court of the United States upon this petition for certiorari.

*Ward* v. *Love County* (1920) 253 U. S. 17, 22, 23 (64 L. Ed. 751, 758);

*Lawrence* v. *State Tax Commission* (1931) 286 U. S. 276, 282, 283 (76 L. Ed. 1102, 1107) and cases cited therein;

*Enterprise Irrigation District* v. *Farmers Mutual Canal Co.* (1916) 243 U. S. 157, 164 (61 L. Ed. 644, 649);

*Leathe* v. *Thomas* (1907) 207 U. S. 93, 99 (52 L. Ed. 118, 120).

This case was decided by the Supreme Court of Indiana in contravention of the rulings in *Hansberry* v. *Lee* (1940) 311 U. S. 32, 45 (85 L. Ed. 22, 28, 29) and *Glasser* v. *United States* (1942) 315 U. S. 60, 76 (86 L. Ed. 680, 702), which are applicable precedents, holding that the dual representation of contingently or potentially conflicting interests is sufficient to vitiate decrees founded thereon.

The court also denied a hearing to this petitioner in refusing to recognize the counsel chosen by the newly elected officers of the corporation, and in refusing to recognize such officers, and by striking out the constitutional claim of right of this petitioner, as against the express contention:

> "That a denial of recognition to said legal representative and said newly chosen officers will deny this corporation due process of law and the equal protection of the laws, and will deprive this corporation of valuable property rights in contravention of the Fourteenth Amendment of the Constitution of the United States." (R. 61.)

The decision of the court did not profess to alter the prevailing *de facto* doctrine long established in Indiana, nor the doctrine that the title to public or private office could not be collaterally decided; besides this holding of the Supreme Court was in the face of duly verified facts uncontradicted by any verified showing that the officers of the petitioner under certified corporate proceedings of their election were actually in possession of and operating the property of the corporation, and filling the corporate offices of those whose terms had actually expired, some of whom had recognized the title of the newly chosen officers.

Petitioner insists the present is a flagrant instance of the vice of the dual representation of interests in actual conflict, aggravated by the circumstance that the dominant parties constraining the selection of their own counsel as counsel

for their adversary were also its trustees. The necessarily invalidating effect of such conduct from the standpoint of due process of law under the Fourteenth Amendment has never been in terms pronounced by this court, although such a situation is undoubtedly within and requires the application of the foregoing and analogous precedents. Both from the standpoint of national interest and importance and the unique grievance here presented this case clearly merits the granting of the writ prayed.

The principles held in *Johnson* v. *Zerbst* (1937), 304 U. S. 458, 463, 464, are also applicable, as well as the classic lack of notice cases: *Windsor* v. *McVeigh* (1876), 93 U. S. 274; *Pennoyer* v. *Neff* (1878), 95 U. S. 714, 733; *Scott* v. *McNeal* (1894), 154 U. S. 34; *Standard Oil Co.* v. *The Missouri ex Rel. Hadley* (1912), 224 U. S. 270, 287 (56 L. Ed. 760, 770); and the unauthorized appearance cases: *National Exchange Bank* v. *Wiley* (1904), 195 U. S. 257, 270 (49 L. Ed. 184, 190); *Hall* v. *Lanning* (1876), 91 U. S. 160, 170 (23 L. Ed. 271, 274, 275); *Shelton* v. *Teflin et al.* (1848), 6 How. 162, 186 (12 L. Ed. 387, 397); and the cases covering changes in judgment after term: *Wetmore* v. *Karrick* (1907), 205 U. S. 141, and analogous cases; *United States* v. *Pink* (1941), 315 U. S. 203, 217; and the cases establishing the vulnerability of State Supreme Court proceedings for want of due process: *Saunders* v. *Shaw* (1917), 244 U. S. 317, 320; *Brinkerhoff-Farris, etc., Co.* v. *Hill* (1930), 281 U. S. 673, 681, 682; *Carlson* v. *Washington ex Rel.* (1914), 234 U. S. 103, 106 (58 L. Ed. 1237, 1238).

Moreover the factual situation out of which the constitutional claims herein arise, namely, a derivative stockholder's suit, wherein the losing officers against whom the recovery for the benefit of the corporation is enforceable, sought to cause appeal to be made in the name of the corporation against its own interest involves constitutional aspects of appellate procedure and of minority stockhold-

ers' rights of national importance in an increasingly important field wherein the principles of fair play as embodied in the Fourteenth Amendment constantly require vindication. Upon the whole case counsel for this petitioner respectfully venture the prediction that a decision by this court of the questions here sought to be reviewed will establish a landmark in the development of the fair-play concept of the Fourteenth Amendment.

5. Petition for Rehearing and Mandate.

A petition for rehearing was filed by Wabash Valley Coach Co. through said newly chosen counsel within the twenty (20) days after the rendition of the judgment of the reversal on February 2, 1943 (R. 125) within the time provided for by Rule 2-22 of the Supreme Court of Indiana. (The Supreme Court Rule 2-22, Supplemental Pocket Part, Burns Ind. Stat. Ann. (1933) page 173.)

This petitioner reiterated the grounds set out in the Petitioner's Motion to Dismiss and specifically charged (Reasons 2, 3, 4 and 8) that the striking out of the Verified Motion to Dismiss denied to this petitioner the right of due process and the equal protection of the laws secured to the petitioner under the Fourteenth Amendment of the Federal Constitution. In Reasons 6 and 9 petitioner contended that the judgment of the court that the petitioner had no interest in the judgment appealed from and that the permanent injunction inhibited all future stockholders' meetings and thereby cut off the authority of newly selected counsel presenting petitioner's Motion were erroneous and untenable and deprived the petitioner of due process and equal protection of the laws under Section 1 of the Fourteenth Amendment.

This motion for rehearing was entertained and overruled without an opinion by the Supreme Court of Indiana on February 8, 1943 (R. 131).

A mandate of reversal was issued in the form of a certified copy of the judgment and the opinion of the Supreme Court was issued and transmitted to the court on February 16th, 1943.

The judgment, decision and opinion of the Supreme Court of Indiana appear in — Ind. —, (Not yet in official report) 46 N. E. (2d) 212—Current N. E. Advance Report—Indiana Addition—(Points 13 and 14, pages 217 and 218, deal specifically with the Motion to Dismiss).

It is urged that this petition for a writ of certiorari itself without reference to appendices or the brief which follows is sufficient in both its statement of facts and law to show the propriety of the granting of the writ. However, for the convenience of the court, full appendices are attached, showing the material portions of the record considerably in detail. A full statement of the principles and authorities upon which the petition relies appear in the attached brief. The material portion of the opinion of the court below appears in appendix 1 to the brief. Also a comprehensive summary of the argument appears in the brief, page 40 below, and a full outline appears above in the index.

(Separate Assignments of Error.)

**Reasons for Allowance of the Writ.**

1. The court erred in its judgment striking out the Special Appearance and Verified Motion of this Petitioner to Dismiss the Appeal below (and reversing the judgment of the trial court), setting up the claims of right of the petitioner alleged therein to arise under Section 1 of the Fourteenth Amendment of the Constitution of the United States in that no notice of the pendency of said appeal was given as required by the Statutes of the State to the said petitioner, the said petitioner not having voluntarily appeared

in said cause except to move the dismissal thereof in said Motion to Dismiss.

2. In this case there was specifically claimed by this petitioner in the Supreme Court of Indiana, its right, specifically asserted to be derived from and based upon Section 1 of the Fourteenth Amendment of the Constitution of the United States, to appear, to be heard and to be bound in said cause in the Supreme Court of Indiana only by and through counsel of its own independent selection, and not to be bound by counsel selected by the parties adverse to it in interest and who in breach of their fiduciary obligation as its officers at the time were seeking to reverse the judgment of the trial court which was beneficial to the petitioner.

3. The Supreme Court of Indiana erred in denying the claim of right of this petitioner under Section 1 of the Fourteenth Amendment of the Federal Constitution that it be not required to appear and be bound by counsel who had been selected by the fiduciaries of said corporation, against whom the judgment being appealed was recovered and enforceable for the benefit of the petitioner.

4. The Supreme Court of Indiana erred in holding that the petitioner corporation had voluntarily appeared in said cause as an appellant through the agency of the same legal counsel who had been selected by and represented its officers, then and there its fiduciaries and adverse in interest in respect to the judgment appealed in said cause, thereby erroneously denying the claim of right of said petitioner corporation derived from and based upon Section 1 of the Fourteenth Amendment of the Federal Constitution, that said dual representation was a denial of due process of law and the equal protection of the laws thereunder.

5. The Supreme Court of Indiana erred in refusing to recognize and to permit to appear on behalf of this peti-

tioner, its counsel independently selected by said petitioner and not by Burwell W. Sale and Gertrude B. Sale, against whom the judgment appealed from was rendered in favor of the petitioner, thereby erroneously denying to the petitioner its claim of right, as a part of the due process of law and the equal protection of the laws secured to said petitioner under Section 1 of the Fourteenth Amendment of the Federal Constitution, duly set up in the said Supreme Court of Indiana by said petitioner.

6. The court below erroneously held it had jurisdiction to proceed and to reverse the judgment of the trial court, and thereby erroneously ruled against and denied the claim of right of this petitioner set up in its Verified Motion to Dismiss the Appeal based upon the first section of the Fourteenth Amendment of the Constitution of the United States, claiming the appeal proceeding was *coram non judice* for want of notice to this petitioner and on account of the nullity of the joinder of this petitioner as an appellant through void, dual representation of legal counsel.

7. The Supreme Court of Indiana erred in holding that the petitioner was only "a nominal party" to the judgment appealed from.

8. The Supreme Court of Indiana erred in holding that the terms of the final judgment being appealed from precluded the holding of future meetings of its stockholders.

9. The Supreme Court of Indiana erred in holding that counsel filing the Special Appearance and Verified Motion to Dismiss of said Petitioner were without jurisdiction.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Indiana, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said

Supreme Court of Indiana had in the case numbered and entitled on its docket, No. 27,718, Wabash Valley Coach Co., Gertrude B. Sale, as President of the Wabash Valley Coach Co., Burwell W. Sale, as Secretary-Treasurer of Wabash Valley Coach Co., Gertrude B. Sale, Burwell W. Sale, Appellants, *vs.* Charles A. Turner, Appellee, to the end that this cause may be reviewed and determined by the court as provided by the statutes of the United States; and that the judgment herein of said Supreme Court of Indiana be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated April 7th, 1943.

WABASH VALLEY COACH CO.,
*Petitioner Herein;*
CHARLES A. TURNER,
*President;*
By THOMAS F. O'MARA,
*Counsel for Petitioner,*
*300 Grand Opera Bldg.,*
*Terre Haute, Ind.*

Attest:
FRANK P. WALTERS,
*Secretary.*